United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1661 ORIGINAL

74-1699
74-1706

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P/S

In The

United States Court of Appeals

For The Second Circuit

FABRIZIO & MARTIN INCORPORATED,
Plaintiff-Appellee-Appellant,

vs.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, MARS ASSOCIATES, INC., and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,
Defendants,

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE,
Defendants-Appellants-Appellees,

AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,
Defendant-Appellee-Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District

ARGUMENT FOR THE BOARD OF EDUCATION IN REPLY TO BRIEF FOR FABRIZIO & MARTIN, INCORPORATED

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ARGUMENT FOR THE BOARD OF EDUCATION IN REPLY TO BRIEF FOR FABRIZIO & MARTIN, INCORPORATED

POINT I

FABRIZIO WAS NOT THE INNOCENT VICTIM HE CLAIMS TO BE

Fabrizio's brief continually depicts Fabrizio as a totally innocent contractor, victimized by a municipality with the approval of the Courts (Fabrizio brief, p. 11).

Fabrizio is described as a "genuinely and totally innocent victim of

the machinations of the Board" (Fabrizio brief, p. 6) whose only wrong was to execute and perform work in accordance with the directives of the Board.

Fabrizio protests too much. Judge McLean's decision is the proof (80a-95a). Although the transcript of the hearings held by Judge McLean is not in the record on this appeal, the decision recits enough detail to make clear that Fabrizio was an active participant and negotiator in the illegal bidding process. On February 10, 1964 Fabrizio met with four members of the then Board, the Board's then attorney and a representative of the Board's architect. Not only did Judge McLean take testimony about this meeting, but also a tape recording of the meeting was introduced into evidence together with a typed transcript of the recording. Fabrizio was one of the "participants in the meeting," as Judge McLean phrased it, and he and the others together "attempted to find a way" to eliminate $171,000.00 worth of work from the specifications to compensate him for the bidding error he told the Board he had made. Suggestions were made, "but no agreement was reached," except that Fabrizio agreed to "discuss the matter further with the architects."

Obviously, if "no agreement was reached," it was not reached between Fabrizio and the other participants. Was he listening and talking? Obviously. Was he the utter innocent that his Brief describes? Hardly.

Fabrizio could not have been such an innocent, because the tape

recording tells what was said in his presence and what he responded. He heard the Board Chairman say to him - not to some mythical person, but to him, Fabrizio:

> "See, we wind ourselves up with the problem that under State law, if we would then take your change of figure here it would then violate the basis upon which we then could grant the contract...there would have to be some way that we could find making this thing up somewhere along the line. Have you got any bright ideas?"

He heard another member spell things out to him in language a contractor understands:

> "I mean, to be utterly blunt about it without saying anything [.] I don't think this is something that would bear repeating...and I think in your mind's eye you have got to go back and look at these contingencies..."

He heard the architect inquire:

> "What would you propose to do then? Enter into the contract without any of this on paper?"

He heard one Board member reply "Oh, no," while another simultaneously said, "You have got to."

And in response to all this, Fabrizio said:

> "I would be willing to cooperate as much as you people would like me to."

He "cooperated" with the architect during the next couple of days. They discussed, explored, collaborated and finally agreed on removal of certain items from the base plans to create the $171,000.00 saving that Fabrizio wanted. On February 18th he wrote a letter to the Board

that if his firm was awarded the contract "at our bid figures," he would withdraw his request to withdraw his bid; but meanwhile he and the architect had worked out changes as a result of which Judge McLean found, "the net saving to Fabrizio came to $1,677.00 more than the $171,000.00 error." And, on March 17, he signed the construction contract at prices which "were the exact sums" bid on January 7, 1964; but simultaneously he signed a change order which, Judge McLean found, reduced his costs by $172,677.00 and required him to make a cash allowance of $1,677.00 to the Board.

In this recital by Judge McLean consistent with the portrait painted in the Brief of a public works contractor who didn't know what was happening, who was oblivious? Of course not.

Yes, he did hear the question put to the Board's attorney at the February 10th meeting:

> "Is this reasonable to do, counsel, without prejudice? We don't expose ourselves to slings and arrows from the other bidders?"

Yes, he did hear the answer:

> "No. No exposure."

But Judge McLean's decision does not reveal what Fabrizio thought of this answer; nor does the decision tell, as of course it cannot, for this was not an issue at the hearing, whether Fabrizio consulted with his attorneys during the period from February 10th to March 17th.

There is a finding by Judge McLean that the Board's attorney advised the Superintendent of Schools that although Fabrizio's contract provided for $99,000.00 for Alternate No. 3, on which the bond issue was only $95,000.00:

> "Mr. Fabrizio has agreed orally with Mr. Van Allsburg [chairman of the Board] that the certificates covering this work will not exceed $95,000.00 but that this will not affect the total contract price."

It is a fair inference that no experienced public works contractor engages in such a conversation without at least suspecting that there may be a violation of the public bidding laws.

It is not meant by this discussion to charge Fabrizio or the former Board members with fraud or malice, for no one believes there was any. Judge McLean said specifically:

> "Here the question is not one of fraud, but of illegality."

As Judge McLean reported his findings of fact, it is clear that he found all of the participants, including the Board members and Fabrizio, had committed impropriety, wrongdoing and illegality although not fraud.

Even though both parties may have been innocent of intent to do wrong, the fact found by Judge McLean is that wrong was done, and Fabrizio cannot escape from his participation.

POINT II

FABRIZIO'S BRIEF MISINTERPRETS THE GERZOF AND GERED DECISIONS.

For the first time the plaintiff, Fabrizio contends that neither the ruling in Gered Construction Corp. v. New York City Tr. Authority, 22 N.Y. 2nd 187; 292 N.Y.S. 2nd 98, nor in Gerzof v. Sweeney, 22 N.Y. 2nd 297; 292 N.Y.S. 2nd 640 is applicable to the present case.

This is certainly a strange position since all of the parties have agreed that the results in those cases, and in particular Gerzof v. Sweeney are controlling in the instant action and since the decisions of Judges McLean, Ryan and Carter rested squarely upon those rulings.

The basis for Fabrizio's assertion is that in both Gered and Gerzof the bidders were willing participants if not the prime movers in the violation of the bidding statutes whereas Fabrizio is "totally innocent" of any wrongdoing.

The myth of Fabrizio's innocence has already been dispelled. Moreover, neither Gered nor Gerzof were decided because of the guilt of the contractors.

As the Court held in Gerzof v. Sweeney (p.304):

> "The restrictions imposed by such legislation...[the competitive bidding statutes]...are designed as a safeguard against the extravagance or corruption of officials as well as against their collusion with vendors" (emphasis added).

As the Court stated, the statutes are designed to protect against the extravagance of officials and not merely their collusion with

corrupt vendors.

In Gerzof the Court found that the contractor was not an "innocent victim" but a willing participant in the violation of the bidding statutes. Yet the Court fashioned an equitable remedy. Its decision could not therefore have been based on the guilt or innocence of the contractor.

The Court stated its reason for creating an equitable remedy and foregoing complete forfeiture in Gerzof when it said, at page 305, that:

> "...the sheer magnitude of the forfeiture that would be suffered by the defendant...as well as the corresponding enrichment that would enure to the Village of Freeport... adds an element to this case not to be found in any of those in which the principles we have been discussing have been applied" (emphasis added).

The basis for the creation of an "equitable" remedy in Gerzof was not the guilt or innocence of the bidder but the "magnitude of the forfeiture and corresponding enrichment", elements not found in the instant action.

In the instant action should the decision of the District Court stand it would be the public which would suffer a loss in disregard of the public policy of the State of New York and the applicable law as set forth in the Gerzof decision.

In Gered the New York Court of Appeals stated:

> "We have constantly held, primarily on public policy grounds, that, where the City fathers have deviated from the statutory mode for the expenditure of funds and letting of contracts, the party with whom the contract was made could not recover..."

The Court placed no import upon the guilt or innocence of the

contractor. In fact, the Court held that collusion on the part of the bidder should not affect this policy when it added:

> "The result should not differ where the due administration of the bidding statute is interferred with and competitive bidding thwarted by the unlawful collusion of the bidders themselves, resulting in a gross fraud upon the public."

Moreover, Judge Fuld, in reaffirming the New York Rule that in order to preserve the sanctity of the public bidding statutes a contractor who is party to an illegal contract must be punished for his participation regardless of his culpability or the misconduct of public officials involved stated:

> "We may adopt this course, in the usual circumstances of the present case, [the magnitude of forfeiture as well as corresponding enrichment] without disturbing the salutory rationale and policy underlining such decisions as Albany Supply and Equipment Co. v. City of Cohoes ..." (at page 304).

The underlying policy of which Fuld speaks is that the public must suffer no damages as a result of the illegal contract.

POINT III

THERE IS NO EXCEPTION TO THE RULE AS SET FORTH IN GERZOF THAT THE PUBLIC MUST RECEIVE AT LEAST WHAT IT CONTRACTED FOR, OR WHAT IT WOULD HAVE CONTRACTED FOR HAD THERE BEEN NO ILLEGALITY

Fabrizio contends that the Board's assertion that there is no exception to the rule - as set forth in the cases determined prior to Gerzof, and as reaffirmed by the Court of Appeals in Gerzof - that the public

must receive at least what it contracted for, or what it would have contracted for had there been no illegality, is contradicted by Board's own citations (Fabrizio's brief, p. 9).

Fabrizio also questions the Board's assertion that the law provides absolutely no right of recovery for a contractor in a "non-statutory compliance situation", claiming this assertion is also contradicted by Board's own citations.

In support of this position Fabrizio cites Edwards v. Renton, 67 Wash. 2nd 598; 409 P. 2nd 153.

In fact, the Edwards decision supports the contention of the Board that the public must receive at least what it contracted for or what it would have contracted for had their been no illegality and that there may be no recovery on the part of the contractor.

The Washington Supreme Court in determining the possible recovery, held that the amount recoverable, "is not measured by the amount actually paid for the improvement. Rather, the recovery should approximate as closely as possible the result which would have been obtained had the budget and bid statutes been properly utilized..." (emphasis added).

In effect the result which the Court directed was that the public should receive at least what it would have contracted for had there been no illegality and had the budget and bid statutes been properly utilized.

Fabrizio cites Brady v. New York, 20 N.Y. 312 to support its

contention that Board's assertion that the contractor may not recover and that the public must receive at least what it contracted for is not supported by Board's citations.

In Point II of its brief Fabrizio states that whether the Court below would have ruled as it did, in denying Fabrizio recovery, if it had been aware of Brady is a matter of conjecture.

As a matter of fact there is no reason for conjecture since the New York Court of Appeals was aware of the decision of Brady in deciding Gered and held that Brady was part of a long line of decisions in which the Court had held that there could be no recovery by the party with whom the illegal contract had been made.

The Court stated:

> "The provisions of the statutes and ordinances of this State requiring competitive bidding in the letting of public contracts evince a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price. In addition, the obvious purpose of such statutes is to guard against favoritism, improvidence, extravagance, fraud and corruption. They 'are enacted for the benefit of property holders and tax payers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to public interest'. To this end, a long line of cases starting with Brady v. Mayor, etc., v. City of New York . . . and ending most recently with Albany Supply and equipment Company v. City of Cohoes, . . . we have consistently held, primarily on public policy grounds, that, where the City fathers have deviated from the statutory mode for expenditure of funds and letting of contracts, the party with whom the contract was made could not recover in quantum meruit or quantum valebant (at pp. 192 - 193 emphasis supplied)."

As a matter of fact therefore the citations of the Board do support its position and Fabrizio may not recover either on the illegal contract or in quantum meruit or quantum valebant.

POINT IV

PUBLIC POLICY AND THE INTEGRITY OF THE BIDDING STATUTES MAY BE PROTECTED ONLY IF THE PUBLIC IS ALLOWED TO SUFFER NO DAMAGES AS A RESULT OF THE ILLEGAL CONTRACT.

Recovery of damages is the technique that the Court of Appeals in Gerzof and the long line of New York cases has determined as the most fruitful way of preserving the sanctity of the bidding statutes. These cases place the duty of dilingence upon the contractor. The measure of damages is to be determined in such a manner so that the public suffers no loss as a result of the illegal contract. Public policy and the integrity of the bidding statutes will be protected only if the public is allowed to suffer no damages.

In Point III of its brief Fabrizio, ever the "innocent" proposes that any loss suffered by the public should be recovered from the Board of members, the architect and the town attorney. That Fabrizio was not a victim hardly needs repeating. As Judge Moore found the wrong was done "in our case, to the taxpayers, by the connivance of Fabrizio and Board" (127a).

The individual liability of the individual members of the Board, architect and town attorney are not the issue in this matter.

What is the issue is a measure of damages to be recovered by the Board as against Fabrizio and Aetna in order to protect the sanctity of the public bidding statutes.

As the Court in Gered said:

> "The provisions of the statutes and ordinances of this State requiring competitive bidding...are enacted for the benefit of property holders and taxpayers and not for the benefit...of bidders, and should be so construed...with sole reference to the public interest."

To allow Fabrizio to avoid responsibility for the loss suffered by the public would, as the Court in Gerzof said:

> "Reduce to negligible proportions the hazard of selling to a municipality in violation of the bidding regulations" (at pages 306-307).

POINT V

THE BOARD HAD NO DUTY TO MITIGATE DAMAGES

In Point IV of its brief Fabrizio claims that the Board had a duty to mitigate any claimed damages to the public resulting from violation of the bidding statutes.

The meaning of the Gerzof decision is that the illegality provides a shield for the public agency and a sword for the public. The Board had

no responsibility to mitigate damages based upon this guideline.

Moreover, at the time the Board sought another contractor for the completion of its school it was not aware that the contract it had entered into with Fabrizio was done in violation of the statute. It could not therefore attempt to mitigate damages resulting from a violation of the bidding statutes since it was unaware that the bidding statutes had been violated.

Finally, the competitive bidding statutes of this State were enacted for the benefit of property holders and not for the benefit of bidders and must be construed and administered with sole reference to the public interest.

Dated: New York, New York
This 10th day of September, 1974

Respectfully submitted,

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Appellant-Appellee

JEFFRY H. GALLET
ROBERT I. OZIEL
On the Brief.

AFFIDAVIT OF SERVICE

Re: 74-1699
74-1706
Fabrizio & Martin Inc. v. Bd. of Ed. Central School District, etc.

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Defendant-Appellant-Appellee.

That on the 11th day of September, 19 74 I served the within Argument for Board of Education in reply to Reply/Brief for Fabrizio & Martin in the matter of Fabrizio & Martin, Inc. v. Bd. of Ed. Central School District, etc. upon Max E. Greenberg, Esq. Trayman, Harris, Cantor, Reiss & Blasky, Esqs. 100 Church St. New York, NY 10033; Weinstein, Krulewitz & Weiner, P.C. 244 Golden Hill Street, Bridgeport, Conn. 06604 by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 11 th day
of September 19 74.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977.